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No. 491

In the Supreme Court of the United States

October Term, 1964

Corliss Lamont, Doing Business as
Basic Pamphlets, appellant

v.

The Postmaster General of the United States

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, the appellee moves that the judgment of the district court be affirmed.

STATEMENT

This action was instituted by appellant to challenge the constitutionality of 39 U.S.C. 4008, a statute establishing certain postal procedures with respect to unsealed mail matter which, under Section 1(j) of the Foreign Agents Registration Act, 22 U.S.C. 611(j), constitutes "communist political propaganda" and which originates, is printed or otherwise prepared in a foreign country. Under the statute, which was enacted in 1962, 76 Stat. 840, the appellee is required to

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detain all such mail which is not furnished pursuant to subscription and which is not known to be desired by the addressee, and is to deliver such mail only upon the addressee's request. In administering the statute, the Post Office detains any mail which comes within its terms [1] and sends to the addressee a notice identifying the material being detained and advising him that unless he requests delivery by returning the notice and checking the appropriate box, the mail will be destroyed. The Post Office keeps a file of the addresses of those who have expressed an intention to receive such mail in order to facilitate the distribution of this type of mail to willing recipients.

Appellant filed a complaint in the United States District Court for the Southern District of New York on August 13, 1963, in which it was alleged that mail addressed to appellant, including at least one copy of the "Peking Review," had been detained by the Post Office, and that notification of this detention had been mailed to appellant. Appellant requested that a three-judge court be empaneled, that the execution of the statute be enjoined, and that the statute be declared unconstitutional on the ground that it violated the First and Fifth Amendments of the United States Constitution (R. 31–41).

On August 30, 1963, the Acting General Counsel of the Post Office Department notified appellant that the filing of the complaint was deemed by the Post

[1] The determination as to what mail qualifies as "communist political propaganda," which the statute delegates to the Secretary of the Treasury, is made by the Customs Bureau of the Treasury Department.

Office Department to be "an expression of desire * * * to receive all of your mail whether or not the Customs Bureau of the Treasury Department considers it to be Communist political propaganda." The letter advised appellant that instructions had accordingly been issued to postmasters at all foreign screening points "that any mail presently being detained be dispatched and that in the future mail adressed to Basic Pamphlets or to yourself not be detained" (R. 34, 41, 53).

Appellant thereupon amended his complaint to allege that a list or record was being kept of all persons wishing to receive mail of the sort involved in this case and that the keeping of this list violated the Due Process Clause of the Fifth Amendment in that it impliedly stigmatized the arbitrarily drawn class of "persons desiring to receive Communist political propaganda" (R. 29–34).

Appellant moved for summary judgment, and the appellee filed a cross-motion to dismiss the complaint on various grounds, contending principally that the case was moot as a result of the orders issued by the Post Office not to detain any of appellant's mail. A three-judge court was convened. It granted the motion to dismiss on the ground of mootness. All three judges apparently agreed that the case was moot insofar as it involved alleged detention of mail. A majority of the court also held that any claim based on the list or file kept by the Post Office Department was not ripe for adjudication because the possibility of injury to appellant was merely hypothetical and the threat that the list would be generally distributed

was "largely speculative." Judge Feinberg dissented on the ground that the threat of public disclosure made appellant's claim regarding the Post Office list ripe for adjudication.

ARGUMENT

We submit that the majority of the three-judge district court correctly concluded that this case, in its present posture, presented no controversy ripe for adjudication, and that the issue sought to be presented by appellant—*i.e.*, the constitutionality of 39 U.S.C. 4008—could not be decided in this litigation. Consequently, the dismissal of appellant's complaint was proper and should be affirmed.

1. The district court was correct in concluding that this action is moot insofar as appellant seeks thereby to obtain unimpeded delivery of his mail. It is undisputed that all appellant's mail is now being delivered to him without detention of any sort, and, under the terms of the statute, no latitude is allowed the Postmaster General to detain mail after he has become aware that the addressee desires to receive it. Hence appellant is assured of receiving his mail now and in the future, and this is "the ultimate relief which he demanded" (*Taylor* v. *McElroy,* 360 U.S. 709, 711) and to which he would be entitled if he were to prevail on the merits.

Nor can the Postmaster General's conduct be condemned as a "deliberate policy" (Juris. St., p. 11) of avoiding a test of constitutionality. The statute unequivocally exempts from the detention requirement any of the defined mail matter "which is otherwise

ascertained by the Postmaster General to be desired by the addressee." The Post Office would have no authority whatever to detain appellant's mail if it were directly notified by appellant that he wished to receive it. The statute embodies a Congressional policy to leave entirely free access for such mail to persons who want it. Since the statute prescribes no formal notification to the Postmaster General, it is immaterial whether an addressee notifies him directly or whether the Postmaster General "otherwise" learns of that addressee's wishes. In the present case the Postmaster General complied with the statutory obligation by releasing all of appellant's mail after learning that appellant had brought suit—a clear indication of his desire not to have his mail detained.

Accordingly, under well-established principles, the present case has become moot by reason of appellant's expression of desire to receive his mail and the Postmaster General's compliance—as required by statute—with that expression. See *Taylor* v. *McElroy*, 360 U.S. 709; *Atherton Mills* v. *Johnston*, 259 U.S. 13. No order which the district court could enter regarding the delivery of appellant's mail could grant him any right which he does not now possess.[2]

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[2] The rights of other potential recipients may not be asserted in this suit by appellant. As the district court observed (Juris. St., p. 14a), this is not a case like *NAACP* v. *Alabama*, 357 U.S. 449, and *Pierce* v. *Society of Sisters*, 268 U.S. 510, in which an organization or institution is asserting the rights of its members. In the present case, as in *Tileston* v. *Ullman*, 318 U.S. 44, one individual—who cannot be affected by the judgment—is seeking to vindicate the rights of other individuals. This is the classic situation in which the plaintiff must be said to lack standing. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125.

It is no answer to argue, as appellant does (Juris. St., p. 11), that this case involves a question of "continuing public interest." This interest, if it exists, may be asserted in the future by parties whose rights can be affected by a judgment. As the majority of the district court observed (Juris. St., pp. 13a–14a n. 5), a suit brought by a sender of detained material would raise almost identical issues and would not become moot if the Postmaster General were to deliver the mail to any particular addressee who indicated his desire to receive it. And it is the sender, rather than the potential recipient, who would be most seriously affected by any constitutional infirmity of the statute.

Nor do he decisions cited by appellant stand for the proposition that "continuing public importance," standing alone, renders justiciable an otherwise moot case. In all the decisions cited, there was at least a possibility, albeit a remote one, of repeated enforcement against the plaintiff of the allegedly unconstitutional statute. As the Court observed in *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43, "*Voluntary* discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power." (Emphasis added.) The discontinuance in the present case, rather than being "voluntary," was under compulsion of the statute, and this operates as a permanent safeguard against any interference with petitioner's mail.

2. The district court was also correct in concluding that retention of appellant's name on the Post Office list or in its files did not provide a basis for a justiciable claim. If appellant's claim is that any inclusion on the list renders him notorious and "stigmatizes"

his name as an individual who desires to receive "communist political propaganda," it must be observed that these consequences flow from the maintenance of this very action—a course undertaken voluntarily by appellant. Hence even if his name were to be removed from the Post Office list, its public association with this lawsuit would remain. Appellant's objection—which is principally to the public association of the list with communist propaganda—could not, therefore, be met by any order of the district court.

If, on the other hand, appellant's objection is to some future use to which the list may be put, the district court was correct in concluding that such claim was merely hypothetical and not, therefore, ripe for judicial consideration. On the face of the pleadings in this case it appears that any decision concerning use of the list would involve this Court in "abstract, hypothetical or contingent questions" which "[i]t has long been its considered practice not to decide." *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461; see *Poe* v. *Ullman*, 367 U.S. 497.

3. Since the district court did not reach the merits of the constitutional claim, and since that claim cannot be considered insubstantial, we do not urge summary affirmance on the ground of the statute's constitutionality. If the Court is of the view that there is a substantial question concerning the district court's ground for dismissal, we agree that probable jurisdiction should be noted and the case set for argument.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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